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Superior Court of California  
County of Butte  
JUN 14 2013  
Kimberly Flener, Clerk  
By J. STEINBERG Deputy

5 Attorneys for Plaintiff  
COASTLINE RE HOLDINGS CORP.

6  
7 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
8 COUNTY OF BUTTE – CHICO COURTHOUSE  
9

10 COASTLINE RE HOLDINGS CORP.,

11 Plaintiff,

12 vs.

13 OROVILLE SELF STORAGE, LLC, a California  
limited liability company; MSDM  
14 DEVELOPMENT, LLC, a California limited liability  
company; JOHN O'DEA, an individual; MICHAEL  
15 CUNNINGHAM, an individual; and DOES 1  
through 30, inclusive,

16 Defendants.  
17

Case No. 153737 *SLM* FILED BY FAX

**[FURTHER PROPOSED] ORDER: (1)  
GRANTING PLAINTIFF COASTLINE  
RE HOLDINGS CORP.'S MOTION FOR  
SUMMARY JUDGMENT ET AL.; (2)  
DENYING DEFENDANT MICHAEL  
CUNNINGHAM'S MOTION FOR  
SUMMARY JUDGMENT ET AL.; AND  
(3) DENYING DEFENDANT JOHN  
O'DEA'S MOTION FOR SUMMARY  
JUDGMENT ET AL.**

[Proposed Judgment Filed Concurrently  
Herewith]

Motion Hearing:

Date: April 19, 2012  
Time: 9:00 a.m.  
Dept.: C-13  
Judge: Hon. Sandra L. McLean

Hearing on Proposed Orders:

Date: June 14, 2013  
Time: 9:00 a.m.  
Dept.: C-13  
Judge: Honorable Sandra L. McLean

Complaint Filed: May 6, 2011  
Trial Date: Vacated

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[PROPOSED] ORDER: (1) GRANTING PLAINTIFF COASTLINE RE HOLDINGS CORP.'S MOTION FOR SUMMARY  
JUDGMENT ET AL.; (2) DENYING DEFENDANT MICHAEL CUNNINGHAM'S MOTION FOR SUMMARY JUDGMENT ET  
AL.; AND (3) DENYING DEFENDANT JOHN O'DEA'S MOTION FOR SUMMARY JUDGMENT ET AL.

1 **TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

2 On April 19, 2013, at 9:00 a.m., before the Honorable Sandra L. McLean of the above-  
3 entitled Court, located at 655 Oleander Avenue, in Chico, California 95926, the Motion Of Plaintiff  
4 Coastline RE Holdings Corp. (“Coastline”) For A Separate And Several Summary Judgment, or in  
5 the Alternative, Summary Adjudication Against Defendants Michael Cunningham (“Cunningham”)  
6 And John O’Dea (“O’Dea”) (the “Coastline Motion”), the Motion By Defendant Cunningham For  
7 Summary Judgment, or in the Alternative, Summary Adjudication As To The Fourth and Sixth  
8 Causes of Action In Plaintiff’s Complaint, And/or The Eighteenth, Nineteenth, and Twenty-First  
9 Affirmative Defenses In Cunningham’s Answer (the “Cunningham Motion”), the Motion By  
10 Defendant O’Dea For Summary Judgment, or in the Alternative, Summary Adjudication As To The  
11 Third and Fifth Causes of Action In Plaintiff’s Complaint, And/or The Eighteenth, Nineteenth, and  
12 Twenty-First Affirmative Defenses In O’Dea’s Answer (the “O’Dea Motion”) came on regularly for  
13 hearing, the Honorable Sandra L. McLean, presiding.

14 Appearing for Coastline was Peter F. Jazayeri of Jaz, A Professional Legal Corporation.  
15 Appearing for Cunningham was Lawrence A. Jacobson of Cohen & Jacobson, LLP. Appearing for  
16 O’Dea was Sarah Brooks of Aaron, Riechert, Carpol & Riffle, APC.

17 After full consideration of the evidence, including the Coastline Motion, Coastline’s Separate  
18 Statement of Undisputed Facts in support of the Coastline Motion (“Coastline’s Separate  
19 Statement”), the Memorandum of Points and Authorities in Support of the Coastline Motion, the  
20 Appendix of Evidence in support of the Coastline Motion (consisting of the Declaration of Robert  
21 Watts and exhibits thereto, the Declaration of Jeff Goddard and exhibits thereto, and the Declaration  
22 of Dan Platt and exhibits thereto), the Request for Judicial Notice in support of the Coastline Motion,  
23 the Oppositions to the Coastline Motion filed by Cunningham and O’Dea, the Declaration of  
24 Cunningham in support of his Opposition to the Coastline Motion and exhibits thereto (the  
25 “Cunningham Opposition Declaration”), the Declaration of O’Dea in support of his Opposition to  
26 the Coastline Motion (the “O’Dea Opposition Declaration”), the Responses to the Coastline Separate  
27 Statement filed by Cunningham and O’Dea, the Evidentiary Objections filed by Cunningham and  
28 O’Dea to the Declaration of Robert Watts and Jeffrey Goddard, Coastline’s Responses to the

1 Evidentiary Objections filed by Cunningham and O’Dea, the Reply in support of the Coastline  
2 Motion, Coastline’s Evidentiary Objections to the Cunningham Opposition Declaration and the  
3 O’Dea Opposition Declaration, Coastline’s Supplemental Brief in support of the Coastline Motion,  
4 the Supplemental Declaration of Robert Watts in support of the Coastline Motion, the Supplemental  
5 Declaration of Peter Jazayeri in support of the Coastline Motion, the Cunningham Motion, the  
6 Cunningham Separate Statement of Undisputed Facts in Support of Cunningham’s Motion (the  
7 “Cunningham Separate Statement”), the Memorandum of Points and Authorities in Support of the  
8 Cunningham Motion, the Declaration of Michael Cunningham in support of the Cunningham Motion  
9 and exhibits thereto (the “Cunningham Declaration”), the Declaration of Lawrence Jacobson in  
10 support of the Cunningham Motion and exhibits thereto, Coastline’s Opposition to the Cunningham  
11 Motion, Coastline’s Appendix of Evidence filed in support of Coastline’s Opposition to the  
12 Cunningham and O’Dea Motions (consisting of the Declaration of Robert Watts and exhibits thereto,  
13 the Declaration of Jeff Goddard and exhibits thereto, the Declaration of Dan Platt and exhibits  
14 thereto, the Request for Judicial Notice and exhibit thereto, the Declaration of Peter F. Jazayeri and  
15 exhibits thereto, the Declaration of Michael Cunningham in support of Opposition to Coastline’s  
16 Application for a Right to Attach Order and exhibits thereto, and the Declaration of John O’Dea in  
17 support of Opposition to Coastline’s Application for a Right to Attach Order), Coastline’s Response  
18 to the Cunningham Separate Statement, Coastline’s Evidentiary Objections to the Cunningham  
19 Declaration, Cunningham’s Reply in support of the Cunningham Motion, the O’Dea Motion, the  
20 Memorandum of Points and Authorities in support of the O’Dea Motion, O’Dea’s Separate  
21 Statement of Undisputed Facts in support of the O’Dea Motion (the “O’Dea Separate Statement”),  
22 the Declaration of John O’Dea in support of the O’Dea Motion and exhibits thereto (the “O’Dea  
23 Declaration”), the Declaration of Sarah Brooks in support of the O’Dea Motion and exhibits thereto,  
24 Coastline’s Opposition to the O’Dea Motion, Coastline’s Evidentiary Objections to the O’Dea  
25 Declaration, Coastline’s Response to the O’Dea Separate Statement, O’Dea’s Reply in support of the  
26 O’Dea Motion, O’Dea’s Supplemental Brief in support of the O’Dea Motion, Cunningham’s  
27 Supplemental Brief in support of the Cunningham Motion, the Declaration of Lawrence Jacobson  
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1 filed in support of the Supplemental Brief (the “Jacobson Declaration”), Coastline’s Evidentiary  
2 Objections to the Jacobson Declaration, and the oral argument by the parties, and good cause  
3 appearing, the Court, for the reasons set forth in its Ruling on Motions for Summary Judgment and  
4 Summary Adjudication (the “Ruling,” attached hereto as Exhibit “A” and incorporated herein by this  
5 reference), FINDS, ADJUDGES AND ORDERS AS FOLLOWS:

- 6 1. The Coastline Motion is granted, the Cunningham Motion is denied, and the O’Dea  
7 Motion is denied.
- 8 2. As set forth in the Ruling and incorporated herein by this reference, the Court sustains  
9 Coastline’s evidentiary objection to paragraph 25 of the Cunningham Declaration on the  
10 grounds that the testimony is argumentative and that Cunningham lacks foundation. As  
11 set forth in the Ruling and incorporated herein by this reference, the Court overrules all  
12 other evidentiary objections raised by Coastline as to the Cunningham Declaration.
- 13 3. As set forth in the Ruling and incorporated herein by this reference, the Court sustains  
14 Coastline’s evidentiary objections to: (a) paragraph 14 of the O’Dea Declaration on the  
15 grounds that O’Dea lacks personal knowledge and foundation; (b) paragraph 17 of the  
16 O’Dea Declaration on the grounds that O’Dea lacks personal knowledge, lacks  
17 foundation, and that the testimony consists of inadmissible hearsay; and (c) paragraph 22  
18 of the O’Dea Declaration on the grounds that the portion of the statement “or indicated in  
19 any fashion that the effect of the loan was in any way different than as had been  
20 discussed as indicated above” is vague and ambiguous. As set forth in the Ruling and  
21 incorporated herein by this reference, the Court overrules all other evidentiary objections  
22 raised by Coastline as to the O’Dea Declaration.
- 23 4. As set forth in the Ruling and incorporated herein by this reference, the Court sustains  
24 Cunningham’s evidentiary objections to the Declaration of Jeff Goddard submitted by  
25 Coastline in support of the Coastline Motion and in opposition to Cunningham and  
26 O’Dea Motions (the “Goddard Declaration”) with respect to paragraphs 18-20 and 24 on  
27 the grounds that Goddard lacks competence, foundation, or personal knowledge as to any  
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1 knowledge that would have been acquired prior to the time that Pacific Western Bank had  
2 control of the loan file. As set forth in the Ruling and incorporated herein by this  
3 reference, the Court overrules all other evidentiary objections raised by Cunningham as  
4 to the Goddard Declaration.

5 5. As set forth in the Ruling and incorporated herein by this reference, the Court overrules  
6 all of Cunningham’s evidentiary objections to the Declaration of Robert Watts submitted  
7 by Coastline in support of the Coastline Motion and in opposition to Cunningham and  
8 O’Dea Motions.

9 6. As set forth in the Ruling and incorporated herein by this reference, the Court sustains  
10 Coastline’s evidentiary objections to the O’Dea Opposition Declaration with respect to  
11 paragraph 14, page 3, lines 22-24 on the grounds that O’Dea lacks personal knowledge,  
12 lacks foundation, and that the testimony consists of inadmissible hearsay. As set forth in  
13 the Ruling and incorporated herein by this reference, the Court overrules all other  
14 evidentiary objections raised by Coastline as to the O’Dea Opposition Declaration.

15 7. As set forth in the Ruling and incorporated herein by this reference, the Court sustains  
16 Coastline’s evidentiary objections to the Cunningham Opposition Declaration with  
17 respect to: (a) paragraph 14, page 3, lines 9 to 15 on the grounds that the testimony is  
18 barred by the parol evidence rule; (b) paragraph 18 on the grounds that the testimony  
19 irrelevant; (c) paragraph 20, page 4, lines 25 to page 5, line 2 on the grounds that the  
20 testimony asserts a legal conclusion; (d) paragraph 25 on the grounds that that the  
21 testimony asserts a legal conclusion, is argumentative, and lacks foundation; and (e)  
22 paragraph 26 on the grounds that the testimony consists of inadmissible of hearsay. As  
23 set forth in the Ruling and incorporated herein by this reference, the Court overrules all  
24 other evidentiary objections raised by Coastline as to the Cunningham Opposition  
25 Declaration.

26 8. The sham guaranty defense and associated affirmative defenses asserted by Cunningham  
27 and O’Dea (specifically, the 18<sup>th</sup> affirmative defense asserting Code of Civil Procedure §  
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# **EXHIBIT A**

F Superior Court of California F  
 County of Butte  
 MAY 08 2013  
 D Kimberly Flener, Clerk D  
 By *[Signature]* Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA  
 COUNTY OF BUTTE

PACIFIC WESTERN BANK,  
 Plaintiff,

vs.

OROVILLE SELF STORAGE,  
 et al.,  
 Defendants.

CASE NO. 153737

RULING ON MOTIONS FOR  
 SUMMARY JUDGMENT AND  
 SUMMARY ADJUDICATION

This ruling addresses three motions heard on April 19, 2013 on the 9:00 a.m. calendar: Plaintiff's motion for separate and several summary judgment as to defendants Cunningham and O'Dea, the motion of Defendant Cunningham for summary judgment/ adjudication, and the motion of Defendant O'Dea for summary judgment/adjudication. At the April 19 hearing, the Court asked for additional briefing, to be filed by April 26, and took the motions under submission.

This is a case arising out of default on a loan made by Plaintiff's predecessor, Affinity Bank, in January of 2007, for



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3 construction of a self-storage facility. The individual  
4 defendants, Cunningham and O'Dea, signed as guarantors on the  
5 loan. The loan was a construction loan for over \$5,000,000. The  
6 loan went into default in December of 2010.

7 The complaint is for 1) judicial foreclosure, 2) specific  
8 performance of right to possession under deed of trust by  
9 appointment of receiver, 3) breach of guaranty, 4) breach of  
10 guaranty, 5) breach of contract, and 6) injunctive relief. All  
11 causes of action other than the Third and Fourth now have been  
12 dismissed.

13 **MOTION OF DEFENDANTS CUNNINGHAM & SELF STORAGE**

14 Defendants Cunningham and Oroville Self Storage move for  
15 summary judgment and summary adjudication on the Fourth and Sixth  
16 Causes of Action and/or the Eighteenth, Nineteenth, and Twenty-  
17 First affirmative defenses.

18 **Evidentiary Rulings**

19 **Objections of Plaintiff to Cunningham Declaration**

20 Defendant Cunningham filed a declaration in support of his  
21 motion. The objections to that declaration and rulings thereon  
22 are as follows.

23 **Par.11.** "The Loan Applications that were presented to John  
24 O'Dea and me as being applications that would form the basis for  
25 the Bank's making of the Construction Loan were made individually  
26 by John O'Dea and me..."

1. Lack of personal knowledge. Overruled.
2. Lacks foundation. Overruled.
3. Asserts legal conclusion. Overruled.

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3 **Par.14.** "While the request for credit information was  
4 directed to John O'Dea and to me personally, representatives of  
5 Affinity Bank advised us that the information pertained to the  
6 substantiation of our personal responsibility as Borrowers with  
7 the expectation that the Storage Facility would be constructed;  
8 that the real property and improvements (the 'Collateral') would  
9 be the collateral for the Construction Loan; that John O'Dea and  
10 I would arrange for the construction and for the making of the  
11 payments from the reserve account established for that purpose;  
12 and that the intended source of repayment would be the collateral  
13 rather than from personal income or assets. While our Individual  
14 Loan Applications and personal tax returns reflected financial  
15 responsibility, those statements and returns did not reflect, and  
16 were not submitted for the purpose of establishing, an ability to  
17 pay the Construction Loan other than from the income of or  
18 proceeds of sale from the Collateral."

- 11 1. Lack of personal knowledge. Overruled.
- 12 2. Lacks foundation. Overruled.
- 13 3. Asserts legal conclusion. Overruled.
- 14 4. Hearsay. Overruled.
- 15 5. Argumentative. Overruled.

16 **Par.15.** "In order to fund the Construction Loan, Affinity  
17 Bank required that Cunningham and I submit... (a) detailed  
18 construction plans and drawings, (b) information concerning  
19 permits to be required for construction, (c) a construction  
20 budget, and (d) pro forma operating statement of the Collateral  
21 upon completion of construction indicating projected income,  
22 expense, profitability and source of cash from operations for  
23 payment of the Construction Loan."

- 18 1. Lack of personal knowledge. Overruled.
- 19 2. Lacks foundation. Overruled.

20 **Par.18.** "...representatives of Affinity Bank instructed John  
21 O'Dea and me to form a new limited liability company as the  
22 entity to hold title to the Collateral for this business loan as  
23 an administrative convenience for Affinity Bank. The  
24 representatives who made such instruction further advised that  
25 this structure would not alter the substance of the loan in terms  
26 of the bank considering John O'Dea and me to be the 'Borrowers'  
and the Collateral to be the intended source of repayment."

- 23 1. Lack of personal knowledge. Overruled.
- 24 2. Lacks foundation. Overruled.
- 25 3. Hearsay. Overruled.

26 **Par.19.** "Based upon such instruction, John O'Dea and I

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3 formed an entity known as Oroville Self Storage, LLC, and so  
4 advised the Bank with a confirming letter dated December 6, 2006...  
5 containing content specified by Affinity Bank. This confirming  
6 letter states in part: 'The sole purpose of Oroville Self  
7 Storage, LLC is to acquire the land and develop a 130,000 sq foot  
8 self storage facility.' The letter also advised that Oroville  
9 Self Storage, LLC, had no funding other than those monies  
10 available to the Borrowers that the Borrowers had otherwise  
11 intended to utilize in the acquisition of the land for the  
12 project."

- 13 1. Lack of personal knowledge. Overruled.
- 14 2. Lacks foundation. Overruled.
- 15 3. Hearsay. Overruled.
- 16 4. Unduly prejudicial, confusing, or misleading. Overruled.

17 **Par.20.** "As indicated by the statements above, and by the  
18 Letter Confirming Entity Formation, at all times I (a) understood  
19 that the formation of Oroville Self Storage, LLC was a  
20 requirement interposed by Affinity Bank for an unspecified  
21 administrative convenience and not to alter the substantive  
22 rights of the Borrowers; (b) intended that the formation of the  
23 limited liability company would be utilized for that purpose and  
24 not to evade the anti-deficiency prohibitions as to O'Dea and me;  
25 and (c) acted upon the advice from Affinity Bank that the  
26 individuals would hold the status as 'Borrowers'. I was never  
informed by Affinity Bank, or anyone else that the formation of  
the Oroville Self Storage, LLC would alter the substantive rights  
of the Borrowers, or that it would be utilized to evade the anti-  
deficiency prohibitions as to O'Dea and myself."

1. Asserts legal conclusion. Overruled.
2. Vague and ambiguous as to "for an unspecified  
administrative convenience." Overruled.
3. Argumentative. Overruled.
4. Hearsay. Overruled.
5. Asserts a legal conclusion. Overruled.
6. Lacks foundation. Overruled.

**Par.25.** "Rather than being a matter of administrative  
convenience with no substantive distinction, this artificial  
structure was an attempt by Affinity Bank to avoid the anti-  
deficiency statues ...."

1. Asserts legal conclusion. Overruled.
2. Vague and ambiguous as to "for an unspecified  
administrative convenience." Overruled.
3. Argumentative. Sustained.
4. Hearsay. Overruled.

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3 5. Asserts a legal conclusion. Overruled.  
6. Lacks foundation. Sustained.

4 **Par.26.** "At no time did Affinity ever explain to me that  
5 John O'Dea and I would have deficiency liability after a non-  
6 judicial foreclosure sale. To the contrary, Affinity Bank  
7 represented that the structure of utilizing the limited liability  
8 company had no effect on the bar against deficiency after non-  
9 judicial foreclosure. The lack of any substantive change by  
10 utilizing the limited liability structure, as explained by  
11 Affinity Bank, made sense to me in that (a) the Uniform  
12 Residential Loan Applications recited that John O'Dea and I were  
13 the 'Borrowers', (b) the language of the Deed of Trust appeared  
14 to support the comprehensive scope of that lien as the recourse,  
15 (c) the establishment of the reserve account provided the source  
16 of funds for making the payments and (d) the concentration of  
17 focus and effort on constructing a facility that would generate  
18 the funds for debt service was consistent with our understanding  
19 that we would not have deficiency liability after a foreclosure  
20 sale."

- 21 1. Asserts legal conclusion. Overruled.  
22 2. Hearsay. Overruled.  
23 3. Argumentative. Overruled.

24 **Causes of Action**

25 **Fourth Cause of Action - Breach of Guaranty**

26 Coastline, successor in interest to the original lender,  
Affinity Bank, sold the collateral by judicial foreclosure after  
the filing of this action. After taking into account the credit  
bid, Coastline claims a deficiency of \$3,130,599.97. Coastline  
now is proceeding against the individual guarantors for that  
deficiency.

Defendant Cunningham contends that the Fourth Cause of  
Action, for breach of guaranty, has no merit because the  
individuals, Cunningham and O'Dea, were the true borrowers, and  
therefore the sham guaranty defense is applicable. If that is

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3 the case, the collateral at issue having been non-judicially  
4 foreclosed, Plaintiff cannot recover any deficiency against  
5 Cunningham.

#### 6 Sham Guaranty Defense

7 The anti-deficiency laws embodied in CCP §580a through §580d  
8 and CCP §726 reflect a legislative policy that strictly limits  
9 the right to recover deficiency judgments where the amount of the  
10 debt exceeds the value of the security. *Brown v. Jensen* (1953)  
11 41 Cal.2d 193, 197. The anti-deficiency legislation was  
12 established for a public reason and cannot be contravened by a  
13 private agreement. *Valinda Builders, Inc. v. Bissner* (1964) 230  
14 Cal. App. 2d 106, 112. A guarantor may expressly waive the  
15 protections of the antideficiency laws. *Mariners Sav. & Loan*  
16 *Assn. v. Neil* (1971) 22 Cal. App. 3d 232, 235-237. However, "to  
17 collect a deficiency from a guarantor, he must be a true  
18 guarantor and not merely the principal debtor under a different  
19 name. "The protections afforded debtors under the anti-  
20 deficiency laws cannot be subverted by artifice, and a  
21 substantial body of law has developed to protect the principal  
22 debtor against personal liability in cases in which the principal  
23 debtor purports to take on additional liability as a guarantor."  
24 *Cadle Co. II v. Harvey* (2000) 83 Cal.App.4<sup>th</sup> 927, 932. Thus, in  
25 the present case, if Defendants can establish that they were not  
26 true guarantors, but actually were the borrowers, Plaintiff will  
be prohibited from collecting the deficiency against them.

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3 In support of the contention that defendants Cunningham and  
4 O'Dea were the "true borrowers", defendant Cunningham submits the  
5 following purported Undisputed Facts:

6 **Fact #6:** "The Loan Applications with respect to the  
7 Construction Loan identify Cunningham and John O'Dea as the  
8 'Borrowers.'" In support of this statement, defendant submits  
9 the declaration of Cunningham, Par.11, 14, 18, and Exh A to  
10 Cunningham declaration (at vol.6 of the court file), a loan  
11 application signed by the individuals and showing them as  
12 borrowers.

13 In opposition, Plaintiff refers to the declaration of Watts  
14 (also in vol.6), to which is attached, at Exh A, a loan  
15 application which names the individuals as borrows at the top of  
16 the first page, but names Oroville Self Storage, LLC, as borrower  
17 lower down on the same page. As it cannot be determined at this  
18 stage which of these documents was the actual loan application,  
19 this Fact must be deemed disputed.

20 **Facts #7 and #8** are that the Bank requested tax return  
21 information from the individual guarantors. **Fact #9** is that  
22 Cunningham advised the Bank by letter that the sole purpose of  
23 the LLC was to acquire the land upon which the self-storage  
24 facility would be constructed. **Fact #10** is that the only funding  
25 available to the LLC upon its inception was from funds available  
26 to the individuals. **Fact #11** is that the LLC is owned solely by  
these two individuals. **Fact #12** is that Cunningham was not asked

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3 for any financial information pertaining to the LLC, and **Fact #13**  
4 is that no financial information pertaining to the LLC was  
5 provided to the Bank. All these facts are essentially  
6 undisputed. **Fact #14** is that the LLC was created on November 6,  
7 2006 and had no income, assets, credit history, banking history,  
8 or any other financial background as of January, 2007. Plaintiff  
9 disputes this statement with evidence that the LLC owned real  
10 property as of January 17, 2007. **Fact #15** is that the LLC did  
11 not complete a loan application. This is disputed by evidence of  
12 an application made out in the name of the LLC as borrower, which  
13 is attached at Exh.A to the Watts declaration.

14 Under Civil Code §2787, a guarantor is one that agrees to  
15 answer for the debt of another, and so cannot be the borrower  
16 under a different name. The factors to be considered are those  
17 set out in *River Bank America v. Diller* (1995) 38 Cal.App.4<sup>th</sup>  
18 1400, 1420-1421: 1) the lender appears to have structured the  
19 transaction to avoid anti-deficiency rules, 2) the nominal  
20 borrower entity is an uncapitalized corporation, 3) the nominal  
21 borrower entity is owned entirely by the individual guarantors,  
22 4) the lender did not investigate the financial wherewithal of  
23 the nominal borrower, 5) the nominal borrower entity had no  
24 substantial capital or assets, 6) the structure of the agreement  
25 was changed at the instruction of the lender, 7) the nominal  
26 entity borrower was brought into existence for the purpose of the  
proposed financing, 8) the lender researched the financial

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3 strength of the purported guarantors because they were the  
4 parties truly considered the borrowers, 9) aside from the  
5 borrowed funds, the individuals contributed the only monies that  
6 went into the nominal borrower entity.

7 Defendant argues that virtually all of the *River Bank*  
8 factors are in his favor. The bank asked for creation of the  
9 LLC, the LLC was not capitalized, the sole members of the LLC are  
10 Cunningham and O'Dea, the lender did not investigate the  
11 financial wherewithal of the LLC, but only of the individuals,  
12 the LLC had no credit history or any other kind of history, and  
13 other than the borrowed funds, Cunningham and O'Dea provided the  
14 only funds that went into the LLC. There is evidence the loan  
15 application was signed and submitted by Cunningham and O'Dea as  
16 "borrowers". Also, Defendant argues that all the reasons for the  
17 anti-deficiency laws are illustrated by the circumstances of this  
18 case; the bank overvalued the security in lending, the bank made  
19 and accepted a low credit bid upon sale, etc.

20 The arguments and evidence submitted by Cunningham do tend  
21 to support the theory that the guarantors in this case were  
22 actually the borrowers. This evidence would be sufficient to  
23 create a question of fact for the jury on the sham guaranty  
24 defense. The dispute between the parties as to the meaning of  
25 the document could only be properly determined by a consideration  
26 of all the facts and circumstances surrounding its execution.  
Ordinarily, "[f]acts which tend to illustrate or explain the



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3 language used in the contract, and to place the court or jury as  
4 nearly as may be in the situation of the parties as they  
5 contracted, are always admissible when the meaning of the terms  
6 used is debatable." *Superior Wholesale Electric Co. v. Cameron*,  
7 264 Cal. App. 2d 488, 492-493 (Cal. App. 2d Dist. 1968).  
8 However, the original lender in the present case, Affinity Bank,  
9 failed, and was taken into receivership by the FDIC. This brings  
10 into play certain federal legislation.

11 12 USC §1823

12 Under 12 USC §1823(e), and *D'Oench, Duhme & Co. v. FDIC*, 315  
13 US 447 (1942), the maker of a note is estopped from arguing that  
14 it had a side agreement with the failed bank that a note could  
15 not be collected. In *RTC Mortgage Trust v. Schlens* (1998) 62  
16 Cal.App.4<sup>th</sup> 304, 316, the court rejected a borrower's attempt to  
17 assert state law defenses, and affirmed the grant of a summary  
18 judgment in favor of the lender because §1823(e) exists to allow  
19 federal and state bank examiners to rely on a bank's records in  
20 evaluating the worth of the bank's assets, enable a swift  
21 transition of a failed bank to another bank, prevent debtors from  
22 profiting from fraudulent insertion of new terms, and avoid  
23 saddling deposit insurers, taxpayers, or creditors with  
24 inequitable losses. This principle extends to assignees of the  
25 FDIC. It precludes claims that a document means something  
26 different than what it says on its face. *Weber v. New West*  
(1992) 10 Cal.App.4<sup>th</sup> 97, 108.

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3 In *FDIC v. Zook Bros* 973 F.2d 1448, 1452 (9<sup>th</sup> Cir. 1992),  
4 the Court enforced a guaranty "because the FDIC under *D'Oench* and  
5 Section 1823(e) is entitled to rely on documents in a loan file,  
6 and there is no basis for Zook's defenses based on state law as  
7 they depend on inferences contravening the guaranty which are  
8 raised, and may be provide, only by reference to documents which  
9 do not meet the requirements of Section 1823(e)."

10 In the present case, Defendant argues that §1823 is not  
11 applicable because there is no "side agreement" alleged, rather,  
12 the defense of sham guaranty exists as a matter of law based on  
13 all the circumstances of the loan transaction, as described in  
14 the Undisputed Facts set forth above.

15 The Court finds that the theory underlying Defendant's sham  
16 guaranty defense does constitute a side agreement, because it  
17 relies on an understanding between the parties which does not  
18 appear from the face of the operative documents. Certain  
19 statements asserted both in Cunningham's Points & Authorities in  
20 support of his motion and in his Declaration, although not  
21 included in his Separate Statement of Undisputed Facts, further  
22 support this interpretation. Two of these assertions are that  
23 "representatives of Affinity Bank instructed John O'Dea and me to  
24 form a new limited liability company as the entity to hold title  
25 to the Collateral for this business loan as an 'administrative  
26 convenience' for Affinity Bank" (par.18 of the Cunningham  
declaration) and "Affinity Bank represented that the structure of

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3 utilizing the limited liability company had no effect on the bar  
4 against deficiency after non-judicial foreclosure" (par.26 of the  
5 Cunningham declaration). These statements tend to indicate that  
6 defendant Cunningham's theory arises out of an alleged "side  
7 agreement".

8 Defendant argues that Plaintiff should be estopped to assert  
9 the bar of Section 1823 because this theory has not previously  
10 been raised by Plaintiff, either in discovery responses or  
11 otherwise, and trial is less than one month away. The Court  
12 finds, however, that the response to Defendant's Motion for  
13 Summary Judgment is an appropriate time to raise this issue, and  
14 further that the issue has been raised, albeit without specific  
15 mention of 12 USC §1823, in the general allegations at paragraph  
16 1 of the Complaint setting out the FDIC involvement after failure  
17 of the original lending institution.

18 The Court finds that the 12 USC §1823 does apply to bar the  
19 sham guaranty defense in this case, based on federal preemption.  
20 Although there may be some ambiguity created by certain documents  
21 generated during the application and negotiation process, the  
22 FDIC and its successors are entitled to rely upon the final  
23 agreement between the parties. That agreement consists of the  
24 note and deed of trust, and includes the guaranties signed by the  
25 individual defendants herein. The motion of Mr. Cunningham for  
26 summary adjudication on this cause of action, therefore, is  
denied.

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Sixth Cause of Action

Defendant contends that the Sixth Cause of Action for injunctive relief has no merit because the collateral at issue was non-judicially foreclosed, thereby rendering moot all relief sought in the Sixth Cause of Action.

This cause of action was dismissed on April 18, 2013, without prejudice. The motion is granted as to the Sixth Cause of action.

18<sup>th</sup> Affirmative Defense

Defendant contends that the One Form of Action Rule is a complete defense on the grounds that Cunningham and O'Dea were the true borrowers, that the purported guaranty fails under the sham guaranty defense, that the collateral was non-judicially foreclosed, and that Plaintiff cannot recover any deficiency against Cunningham.

The motion is denied for the reasons previously discussed under the heading "Fourth Cause of Action", above.

19<sup>th</sup> Affirmative Defense

Defendant contends that the Anti-Deficiency Rule provides a complete defense on the grounds that Cunningham and O'Dea were the true borrowers, that the purported guaranty fails under the sham guaranty defense, that the collateral was non-judicially foreclosed, and that Plaintiff cannot recover any deficiency against Cunningham.

The motion for summary adjudication is denied for the

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3 reasons already discussed.

4 21<sup>st</sup> Affirmative Defense

5 Defendant contends that the sham guaranty defense  
6 (artificial loan structure) provides a complete defense on the  
7 grounds that Cunningham and O'Dea were the true borrowers, that  
8 the purported guaranty fails under the sham guaranty defense,  
9 that the collateral was non-judicially foreclosed, and that  
10 Plaintiff cannot recover any deficiency against Cunningham.

11 The motion is denied for the reasons already discussed.

12 **MOTION OF DEFENDANT O'DEA**

13 Defendant moves for summary adjudication of the Third and  
14 Fifth Causes of Action and the 18<sup>th</sup>, 19<sup>th</sup> and 21<sup>st</sup> Affirmative  
15 Defenses. This motion closely tracks the Cunningham motion.

16 Procedural Matters

17 Plaintiff's Objections to Declaration of O'Dea

18 **Par.9.** "The credit applications that formed the basis for  
19 the making of the Construction Loan were made individually by  
20 Cunningham and me (sometimes referred to jointly as the  
21 'Borrowers'...)." 22

- 23 1. Lack of personal knowledge. Overruled.  
24 2. Lacks foundation. Overruled.

25 **Par.13.** "In order to fund the Construction Loan, Affinity  
26 Bank required that Cunningham and I submit... (a) detailed  
construction plans and drawings, (b) information concerning  
permits to be required for construction, (c) a construction  
budget, and (d) pro forma operating statement of the Collateral  
upon completion of construction indicating projected income,  
expense, profitability and source of cash from operations for  
payment of the Construction Loan."

1. Lack of personal knowledge. Overruled.  
2. Lacks foundation. Overruled.

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3       **Par.14.** "The valuation utilized by Affinity Bank was  
4 reflected in that Appraisal Report dated November 28, 2006, as  
5 prepared by PGP Valuation ... that established the value of the  
6 Collateral by alternative methods as follows: Cost Approach:  
7 \$7,810,000; Income Approach: \$7,880,000; Sales Comparison  
8 Approach: \$8,010,000."

- 9  
10       1. Lack of personal knowledge. Sustained.  
11       2. Lacks foundation. Sustained.

12       **Par.15.** "Based upon construction loan funding in the amount  
13 of \$5,176,500, the equity in the Collateral above the loan  
14 balance under the alternative valuations was: Equity Per Cost  
15 Approach: \$2,633,500; Equity Per Income Approach: \$2,703,500;  
16 Equity Per Sales Comparison Approach: \$2,833.500."

- 17       1. Lack of personal knowledge. Overruled.  
18       2. Lacks foundation. Overruled.

19       **Par.17.** "representatives of Affinity Bank instructed  
20 Cunningham, and Cunningham instructed me, to form a new limited  
21 liability company as the entity to hold title to the Collateral  
22 for this business loan as an administrative convenience for  
23 Affinity Bank."

- 24       1. Lack of personal knowledge. Sustained, as to what  
25 representatives of Affinity Bank instructed Cunningham to do.  
26       2. Lacks foundation. Sustained.  
      3. Hearsay. Sustained.

**Par.18.** "Based upon such instruction, John O'Dea and I formed  
an entity known as Oroville Self Storage, LLC, and so advised the  
Bank with a confirming letter dated December 6, 2006... containing  
content specified by Affinity Bank. This confirming letter  
states in part: 'The sole purpose of Oroville Self Storage, LLC  
is to acquire the land and develop a 130,000 sq foot self storage  
facility.' The letter also advised that Oroville Self Storage,  
LLC, had no funding other than those monies available to the  
Borrowers that the Borrowers had otherwise intended to utilize in  
the acquisition of the land for the project."

1. Lack of personal knowledge. Overruled.  
      2. Lacks foundation. Overruled.  
      3. Hearsay. Overruled.  
      4. Unduly prejudicial, confusing, or misleading. Overruled.

**Par.19.** As indicated by the statements above, and by the  
Letter Confirming Entity Formation, at all times I (a) understood

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3 that the formation of Oroville Self Storage, LLC was a  
4 requirement interposed by Affinity Bank for an unspecified  
5 administrative convenience and not to alter the substantive  
6 rights of the Borrowers; (b) intended that the formation of the  
7 limited liability company would be utilized for that purpose and  
8 not to evade the anti-deficiency prohibitions as to O'Dea and me;  
9 and (c) acted upon the advice from Affinity Bank that the  
10 individuals would hold the status as 'Borrowers'. I was never  
11 informed by Affinity Bank, or anyone else that the formation of  
12 the Oroville Self Storage, LLC would alter the substantive rights  
13 of the Borrowers, or that it would be utilized to evade the anti-  
14 deficiency prohibitions as to Cunningham and myself."

- 15  
16 1. Asserts legal conclusion. Overruled.  
17 2. Vague and ambiguous as to "for an unspecified  
18 administrative convenience." Overruled.

19  
20 **Par.22.** "No representative of Affinity Bank was present at  
21 the signing of the documents, and no one acting on behalf of  
22 Affinity Bank offered any explanation of the documents or  
23 indicated in any fashion that the effect of the loan was in any  
24 way different than as had been discussed as indicated above."

- 25  
26 1. Vague and ambiguous as to the phrase "or indicated in  
any fashion that the effect of the loan was in any way different  
than as had been discussed as indicated above." Sustained.

1. **Par.23.** "At no time did Affinity ever explain to me that  
Cunningham and I would have deficiency liability after a non-  
judicial foreclosure sale."

1. Asserts legal conclusion. Overruled.

**Par.28.** "This bid amount represents approximately 55% of  
the amount claimed due at the date of the sale, and represents  
36% of the lowest appraised value utilized by Affinity in making  
the Construction Loan."

1. Lack of personal knowledge. Overruled.  
2. Lack of personal knowledge. Overruled.  
3. Lacks foundation. Overruled.  
4. Argumentative. Overruled.

#### Analysis

Because, as already discussed in connection with the  
Cunningham motion, 12 USC §1823 bars application of the sham

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3 guaranty defense in this case under the theory of federal  
4 preemption, the motion is denied.

5 **PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

6 Plaintiff moves for summary judgment on the Third and Fourth  
7 Causes of Action, for breach of guaranty, against the two  
8 individual defendants based on failure to pay the deficiency  
9 amount due on the loan after the foreclosure sale.

10 **Evidentiary Rulings**

11 **Objections of Cunningham to Goddard & Watts Declarations**

12 **Goddard Declaration**

13 Mr. Goddard declares that he is an executive vice-president  
14 for Pacific Western Bank (PWB), of which plaintiff Coastline is a  
15 wholly owned subsidiary. Mr. Goddard testifies about the  
16 background facts of the loan. However Mr. Goddard only took over  
17 the loan in 2009, when PWB obtained the loan from the FDIC. At  
18 par.7 of his declaration, Mr. Goddard indicates that, throughout  
19 his testimony, "Bank" refers to PWB and Affinity Bank,  
20 collectively. He does not indicate how he has any knowledge of  
21 Affinity Bank's practices and procedures.

22 **Par. 18.** "On or about January 17, 2007, for valuable  
23 consideration, Borrower and Affinity entered into a Construction  
24 Loan Agreement ... pursuant to which Plaintiff entered into a loan  
25 in the principal amount of \$5,176,500 plus interest for purposes  
26 of constructing a 660-unit self-storage facility."

1. Lacks competence. Sustained as to any knowledge that  
would have to have been acquired prior to the time PWB had  
control of the loan file.

2. Lack of personal knowledge. Sustained as to any  
knowledge that would have to have been acquired prior to the time



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3 PWB had control of the loan file.

4 3. Lack of foundation. Sustained as to any knowledge that  
5 would have to have been acquired prior to the time PWB had  
6 control of the loan file.

7 4. Hearsay. Overruled.

8 5. Contradicts verified discovery responses. Overruled;  
9 Cunningham has not provided citation to the pertinent discovery  
10 responses.

11 Par. 19. "In connection with the Construction Loan,  
12 Borrower, as maker, executed and delivered to Affinity as holder,  
13 a Promissory Note dated January 17, 2007 in the original  
14 principal face amount of \$5,176,500... Based on the Construction  
15 Loan, Initial Note and other documents pertaining to the  
16 Construction Loan, including a Deed of Trust, an Assignment of  
17 Rents, a Change in Terms Agreement, and two Commercial Guaranty  
18 Agreement, Affinity loaned \$5,176,500 in principal amount of  
19 borrower."

20 1. Lacks competence. Sustained as to any knowledge that  
21 would have to have been acquired prior to the time PWB had  
22 control of the loan file.

23 2. Lack of personal knowledge. Sustained as to any  
24 knowledge that would have to have been acquired prior to the time  
25 PWB had control of the loan file.

26 3. Lack of foundation. Sustained as to any knowledge that  
would have to have been acquired prior to the time PWB had  
control of the loan file.

4. Hearsay. Overruled.

5. Contradicts verified discovery responses. Overruled;  
Cunningham has not provided citation to the pertinent discovery  
responses.

Par. 20. "Having reviewed the Loan Documents, I am familiar  
with the transaction set forth in the Loan Documents between  
Affinity and Borrower. Pursuant to the Loan Documents, Borrower  
promised to pay Affinity monthly installments of interest and  
principal. The Loan Documents also provide for the payment of  
all costs, including reasonable attorneys fees, in any action to  
enforce any of PWB's rights thereunder."

1. Lacks competence. Sustained as to any knowledge that  
would have to have been acquired prior to the time PWB had  
control of the loan file.

2. Lack of personal knowledge. Sustained as to any  
knowledge that would have to have been acquired prior to the time  
PWB had control of the loan file.

3. Lack of foundation. Sustained as to any knowledge that  
would have to have been acquired prior to the time PWB had

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3 control of the loan file.

4 4. Hearsay. Overruled.

5 5. Contradicts verified discovery responses. Overruled;  
6 Cunningham has not provided citation to the pertinent discovery  
7 responses.

8 **Par.24.** "On or about January 17, 2007, Affinity and  
9 Cunningham entered into a Commercial Guaranty Agreement ...  
10 pursuant to which Cunningham absolutely and unconditionally  
11 guaranteed Borrower's obligations pursuant the Loan Documents."

12 1. Lacks competence. Sustained as to any knowledge that  
13 would have to have been acquired prior to the time PWB had  
14 control of the loan file.

15 2. Lack of personal knowledge. Sustained as to any  
16 knowledge that would have to have been acquired prior to the time  
17 PWB had control of the loan file.

18 3. Lack of foundation. Sustained as to any knowledge that  
19 would have to have been acquired prior to the time PWB had  
20 control of the loan file.

21 4. Hearsay. Overruled.

22 5. Contradicts verified discovery responses. Overruled;  
23 Cunningham has not provided citation to the pertinent discovery  
24 responses.

#### 25 Watts Declaration

26 Mr. Watts testifies that (unlike Goddard) he worked for  
Affinity, and sets forth in detail his knowledge of the record  
keeping procedures at Affinity Bank.

**Par.1.** "...the obligations owed by Oroville Self-Storage, LLC  
( 'Borrower' ) and Michael Cunningham ( 'Cunningham' ) and John O'Dea  
( 'O'Dea' ) which is the subject of this lawsuit."

1. Lacks competence. Overruled. The quoted material  
contains no assertion to which this objection can be addressed.

2. Lack of personal knowledge. Overruled. The quoted  
material contains no assertion to which this objection can be  
addressed.

3. Lack of foundation. Overruled. The quoted material  
contains no assertion to which this objection can be addressed.

4. Hearsay. Overruled. The quoted material contains no  
assertion to which this objection can be addressed.

**Par.3.** "In my role as Director of Asset Disposition, I was  
the bank officer most knowledgeable and familiar with the loan to

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3 Borrower."

- 4 1. Lacks competence. Overruled.  
5 2. Lack of personal knowledge. Overruled.  
6 3. Lack of foundation. Overruled.  
7 4. Hearsay. Overruled.

8 **Par.8, 4:4-7.** "With respect to this loan, Borrower, working  
9 with its broker ... submitted a loan application that was executed  
10 by its members and managers, O'Dea and Cunningham, on behalf of  
11 Borrower on or about December 6, 2006."

- 12 1. Lacks competence. Overruled.  
13 2. Lack of personal knowledge. Overruled.  
14 3. Lack of foundation. Overruled.  
15 4. Hearsay. Overruled.

16 **Par.8, 4:8-13.** "In addition, concurrently with the loan  
17 application, Borrower also submitted a copy of [various  
18 documents]."

- 19 1. Lacks competence. Overruled.  
20 2. Lack of personal knowledge. Overruled.  
21 3. Lack of foundation. Overruled.  
22 4. Hearsay. Overruled.

23 **Par.9, 4:21-24.** "On or about January 17, 2007, for valuable  
24 consideration, Borrower and Affinity entered into a Construction  
25 Loan Agreement ... pursuant to which Plaintiff entered into a loan  
26 in principal amount of \$5,175,400 plus interest for purposes of  
constructing a 660-unit self-storage facility."

1. Lacks competence. Overruled.  
2. Lack of personal knowledge. Overruled.  
3. Lack of foundation. Overruled.  
4. Hearsay. Overruled.

**Par.10, 4:26-5:5.** "In connection with the Construction  
Loan, Borrower, as maker, executed and delivered to Affinity as  
holder, a Promissory Note dated January 17, 2007 in the original  
principal fact amount of \$5,176,500 ... Based on the Construction  
Loan, Initial Note and other documents pertaining to the  
Construction Loan, including a Deed of Trust, an Assignment of  
Rents, a Change In Terms Agreement, and two Commercial Guaranty  
Agreements, Affinity loaned \$5,176,500 in principal amount to  
Borrower."

1. Lacks competence. Overruled.  
2. Lack of personal knowledge. Overruled.

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3           3. Lack of foundation. Overruled.  
4           4. Hearsay. Overruled.

5           **Par.13, 5:19-21.** "On or about January 17, 2007, Affinity  
6 and Cunningham entered into a Commercial Guaranty Agreement ...  
7 pursuant to which Cunningham absolutely and unconditionally  
8 guaranteed Borrower's obligations pursuant to the Loan  
9 Documents."

- 10           1. Lacks competence. Overruled.  
11           2. Lack of personal knowledge. Overruled.  
12           3. Lack of foundation. Overruled.  
13           4. Hearsay. Overruled.

14           **Par.14, 5:27-6:1.** "In reliance on the Guaranty, Affinity  
15 extended credit to Borrower, at Borrower's request, and pursuant  
16 to the terms of the Note, in the principal sum of \$5,176,500."

- 17           1. Lacks competence. Overruled.  
18           2. Lack of personal knowledge. Overruled.  
19           3. Lack of foundation. Overruled.  
20           4. Hearsay. Overruled.

21           **Par.14, 5:27-6:1.** "Affinity performed each and all of the  
22 obligations and conditions precedent required of it under the  
23 Loan Documents including loaning money to Borrower."

- 24           1. Lacks competence. Overruled.  
25           2. Lack of personal knowledge. Overruled.  
26           3. Lack of foundation. Overruled.  
            4. Hearsay. Overruled.

**Watts Declaration, All Exhibits.**

Cunningham argues that the Exhibits are not properly  
authenticated because Watts states he transferred all documents  
out of his custody in 2009, and therefore there is a failure in  
the chain of custody.

Overruled. The Court finds that the chain of custody  
requirements are satisfied by the combined declarations of  
Goddard, Watts and Platt.

Plaintiff's Objections to O'Dea Declaration

**Par.14, 3:22-24.** "representatives of Affinity Bank  
instructed Cunningham, and Cunningham instructed me, to form a  
new limited liability company as the entity to hold title to the  
Collateral for this business loan as an administrative

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3 convenience for Affinity Bank."

4 1. Lack of personal knowledge. Sustained, as to what  
Affinity Bank said to Cunningham.

5 2. Lacks foundation. Sustained, as to what Affinity Bank  
said to Cunningham.

6 3. Hearsay. Sustained, as to what Affinity Bank said to  
Cunningham.

7 **Par.16, 4:11-12.** "at all times I understood that the  
8 formation of Oroville Self Storage, LLC was a requirement  
interposed by Affinity Bank for an unspecified administrative  
9 convenience."

10 1. Lack of personal knowledge. Overruled.

11 2. Lacks foundation. Overruled.

12 **Par.16, 4:12-15.** "I was never informed by Affinity Bank or  
13 anyone else, that formation of Oroville Self Storage, LLC would  
alter the substantive rights of the Borrowers, or that it would  
14 be utilized to evade the anti-deficiency prohibitions as to  
Cunningham and myself."

15 1. Lack of personal knowledge. Overruled.

16 2. Lacks foundation. Overruled.

17 3. Argumentative. Overruled.

18 4. Asserts legal conclusion. Overruled.

19 5. Unduly prejudicial, confusing, or misleading. Overruled.

20 **Par.16, 4:15-16.** "I understood, based on Cunningham's  
21 communications with Affinity Bank, that Cunningham and I would  
hold the status as 'Borrowers'."

22 1. Lack of personal knowledge. Overruled.

23 2. Lacks foundation. Overruled.

24 3. Argumentative. Overruled.

25 4. Asserts legal conclusion. Overruled.

26 **Par.26, 6:21-23.** "This bid amount represents approximately  
fifty-five percent of the amount claimed due at the date of the  
sale, and represents thirty-six percent of the lowest appraised  
value utilized by Affinity in making the Construction Loan."

1. Lack of personal knowledge. Overruled.

2. Lacks foundation. Overruled.

Plaintiff's Objections to Declaration of Cunningham

**Par.11.** "as being applications that would form the basis for

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3 the Bank's making of the Construction Loan..."

- 4 1. Lack of personal knowledge. Overruled.  
5 2. Lack of personal knowledge. Overruled.  
6 3. Lacks foundation. Overruled.  
7 4. Asserts legal conclusion. Overruled.  
8 5. Irrelevant. Overruled.  
9 6. Barred by Parol Evidence Rule. Overruled.

10 **Par.14, 3:9-15.** "representatives of Affinity Bank advised  
11 us that that information pertained to the substantiation of our  
12 personal responsibility as Borrowers with the expectation that  
13 the Storage Facility would be constructed; that the real property  
14 and improvements ... would be the collateral for the Construction  
15 Loan; that John O'Dea and I would arrange for the construction  
16 and for the making of the payments from the reserve account  
17 established for that purpose; and that the intended source of  
18 repayment would be the collateral rather than from personal  
19 income or assets."

- 20 1. Lack of personal knowledge. Overruled.  
21 2. Lacks foundation. Overruled.  
22 3. Asserts legal conclusion. Overruled.  
23 4. Hearsay. Overruled.  
24 5. Argumentative. Overruled.  
25 6. Irrelevant. Overruled.  
26 7. Barred by Parol Evidence Rule. Sustained.

**Par.14, 3:15-18.** "While our Individual Loan Applications  
and personal tax returns reflected financial responsibility,  
those statements and returns did not reflect, and were not  
submitted for the purpose of establishing, an ability to pay the  
construction Loan other than from the income of or proceeds of  
sale from the Collateral."

1. Lack per personal knowledge. Overruled.  
2. Argumentative. Overruled.

**Par.18.** "...representatives of Affinity Bank instructed John  
O'Dea and me to form a new limited liability company as the  
entity to hold title to the Collateral for this business loan as  
an administrative convenience for Affinity Bank. The  
representatives who made such instruction further advised that  
this structure would not alter the substance of the loan in terms  
of the bank considering John O'Dea and me to be the 'Borrowers'  
and the Collateral to be the intended source of repayment."

1. Lack of personal knowledge. Overruled.  
2. Lacks foundation. Overruled.

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3 3. Hearsay. Overruled.  
4 4. Irrelevant. Sustained.

5 **Par.20, 4:25-5:2.** "As indicated by the statement above, and  
6 by the Letter Confirming Entity Formation, at all times I (a)  
7 understood that the formation of Oroville Self Storage, LLC was a  
8 requirement interposed by Affinity Bank for an unspecified  
9 administrative convenience and not to alter the substantive  
10 rights of the Borrowers; (b) intended that the formation of the  
11 limited liability company would be utilized for that purpose and  
12 not to evade the anti-deficiency prohibitions as to O'Dea and me;  
13 and (c) acted upon the advice from Affinity Bank that the  
14 individuals would hold the status as 'Borrowers'."

- 15 1. Asserts legal conclusion. Sustained.  
16 2. Vague and ambiguous as to the phrase "for an unspecified  
17 administrative convenience." Overruled  
18 3. Argumentative. Overruled.  
19 4. Hearsay. Overruled.  
20 5. Lacks foundation. Overruled.

21 **Par.25.** "Rather than being a matter of administrative  
22 convenience with no substantive distinction, this artificial  
23 structure was an attempt by Affinity Bank to avoid the anti-  
24 deficiency statutes..."

- 25 1. Asserts legal conclusion. Sustained.  
26 2. Vague and ambiguous as to the phrase "an administrative  
convenience with no substantive distinction." Overruled.  
3. Argumentative. Sustained.  
4. Hearsay. Overruled.  
5. Lacks foundation. Sustained.  
6. Unduly prejudicial, confusing, or misleading. Overruled.

7 **Par. 26.** "At no time did Affinity ever explain that John  
8 O'Dea and I would have deficiency liability after a non-judicial  
9 foreclosure sale. To the contrary, Affinity Bank represented  
10 that the structure of utilizing the limited liability company had  
11 no effect on the bar against deficiency after non-judicial  
12 foreclosure..."

- 13 1. Asserts legal conclusion. Overruled.  
14 2. Hearsay. Sustained.  
15 3. Argumentative. Overruled.  
16 4. Lacks foundation. Overruled.  
17 5. Unduly prejudicial, confusing, or misleading. Overruled.

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Analysis

The undisputed facts show that the defendants signed as guarantors on the loan. Further, the LLC defaulted in payment on the loan. Cunningham and O'Dea, as guarantors, have not made any payments on the loan. The language of the note and guaranties provides that Defendants waive the anti-deficiency provisions of California law. The only substantive defense raised by the defendants is the defense of sham guaranty and, as set forth above, the Court finds that this defense is barred by 12 USC §1823(e), based on federal preemption.

The plaintiff's motion is granted.

CONCLUSION

The motion of Defendant Cunningham is denied. The motion of Defendant O'Dea is denied. The motion of Plaintiff is granted. Plaintiff is to prepare the forms of order.

5/8/13  
Date

Sandra L. McLean  
Sandra McLean  
Superior Court Judge



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**PROOF OF SERVICE**

**STATE OF CALIFORNIA, COUNTY OF LOS ANGELES**

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 1925 Century Park East, Suite 1380, Los Angeles, California 90067.

On June 11, 2013 I served the **[PROPOSED] ORDER: (1) GRANTING PLAINTIFF COASTLINE RE HOLDINGS CORP.'S MOTION FOR SUMMARY JUDGMENT ET AL.; (2) DENYING DEFENDANT MICHAEL CUNNINGHAM'S MOTION FOR SUMMARY JUDGMENT ET AL.; AND (3) DENYING DEFENDANT JOHN O'DEA'S MOTION FOR SUMMARY JUDGMENT ET AL** on the interested parties in this action pursuant to the attached service list as follows:



**By Facsimile Transmission:** I caused the above-named document to be transmitted by facsimile transmission, from fax number (310) 388-0664 to the offices of the addressee(s) at the facsimile number(s) indicated on the service list. The transmission was reported as complete and without error.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on June 11, 2013 at Los Angeles, California

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Peter F. Jazayeri

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Service List  
*Coastline RE Holdings Corp. v. Oroville Self Storage, et al.*

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